SAMUEL T. PONAMPALAM

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
SHAIK DAUD ISMAIL J
[CRIMINAL APPEAL NO. 12 Of 1982]
26 MARCH 1985

CRIMINAL LAW AND PROCEDURE: *Appeal against conviction for an offence under s. 354 of Penal Code - Grounds of judgment not written by learned Magistrate for over two years - Whether appellate Court has the right to assess and weigh the facts adduced - Whether corroboration for such offence is highly desirable - Whether conviction should be quashed.*

This is an appeal by the appellant against the decision of the learned Magistrate. The appellant was convicted and sentenced to a fine of RM5,000 in default to 9 months' imprisonment for an offence under s. 354 of the Penal Code. The grounds of judgment for the conviction was written more than two years after the conviction. The appellant contended that this undue delay seriously prejudiced him.

The facts of the case were that the complainant was employed by the appellant. She testified that the appellant had requested her to put on sexy clothes and asked her to raise her brassier strap so that her breasts would be prominent. She also testified that she was asked to do this in the toilet and while she was there, the appellant came in and she allowed him to adjust the strap and to fondle her breast when he threatened to dismiss her. The complainant called her colleagues PW3 and PW6 to corroborate her evidence. PW3 testified that she too was asked to adjust her brassier strap and that she saw the complainant entering the appellant's office and going to the toilet about three times and later crying. PW6 testified that she too was called and she saw the complainant crying.

Held:

[1] A delay of over two years in writing the grounds of judgment by the learned Magistrate is most unsatisfactory and may have prejudiced the appellant. In such a case, the learned Magistrate is in no better position than the appellate Court as the learned Magistrate himself could not possibly take advantage of the fact that he had seen and heard the witnesses. The appellate Court is therefore in an equally good position to assess and weigh the facts adduced as the learned Magistrate himself at the lower Court.

[2] In cases of this nature although corroboration of the evidence of the complainant is legally not essential but it is certainly highly desirable. An allegation of this nature is one which is very easy to make but very difficult to rebut. When such an allegation is then made it is necessary to see the probability of it and then to see whether it is supported by independent evidence besides that of the complainant herself, or is corroborated by the conduct and the surrounding circumstances. Corroboration means independent corroboration of material facts which implicate the accused person and tends to confirm that he is guilty of the offence with which he is charged.

[3] The allegation of the complainant is most improbable and was not supported by corroboration as the testimony of PW3 and PW6 cannot be considered as independent corroboration of material facts to implicate the appellant and confirm that he had committed the crime with which he was charged.

[Appeal allowed. Conviction quashed. Fine imposed if paid to be refunded.]

Cases referred to:
Voon Chin Fatt v. PP [1948-49] MLJ Supp 131
Haw Tua Tau v. PP [1981] 2 MLJ 49; [1981] CLJ (Rep) 11

Legislation referred to:
Penal Code, s. 354

JUDGMENT

Shaik Daud Ismail J:

This is an appeal from the decision of the learned Magistrate sitting at Petaling Jaya in which the appellant who was charged for an offence under s. 354 of the Penal Code was, at the conclusion of the trial, convicted and sentenced to a fine of RM5,000 in default to nine months' imprisonment.

Before I go into the facts of the case, I think it is pertinent for me, first and foremost, to deal with the question of delay in writing the judgment by the learned Magistrate as this question constituted the very first ground of attack against the decision of the learned Magistrate.

The appellant was first charged for the offence on 12 January 1981 but his trial only got off the ground exactly one year later on 12 January 1982. The trial concluded on 3 March 1982 whereupon the appellant was convicted of the charge. A notice of appeal against conviction was filed on 15 March 1982. According to the records of appeal before me the learned Magistrate did not write his grounds of judgment for over two years. The judgment was dated 1 June 1984. It is the contention of the appellant that this undue delay seriously prejudiced the appellant. There have been several decisions on the issue of delay in writing judgments and I can do not better than to quote what Spencer Wilkinson J said in *Voon Chin Fatt v. PP* [1948-49] MLJ Supp 131:

> The interval between notice of appeal and delivery of grounds of decision should, in such a case, be a matter of days, not weeks, much less months. Indeed there is very good reason from the Magistrate's point of view why grounds of decision should always be written as promptly as possible. The sooner, after hearing the witnesses the grounds of decision are written the clearer in the mind of the Magistrate who writes them will be all the details of the evidence, the demeanour of the witnesses and the general atmosphere of the case. When delays occur, not only have important details faded out from the mind of the Magistrate who tried the case but also additional work is involved as the whole case have to be studied afresh in order to bring the matter back to mind. In my opinion, the fact that no time limit is laid down by law for giving grounds of decision increases the responsibility of Judges and Magistrates to see that no undue delay occurs and that the spirit of the law rather than its letter is complied.

In the present appeal a delay of over two years in writing the grounds by the learned Magistrate is most unsatisfactory and may have prejudiced the appellant. I am mindful of the fact that an appellate Court should rarely interfere on decisions of a lower Court based mainly on facts, simply because the learned Magistrate is in a better position to assess the facts as he had the advantage of seeing and hearing the witnesses as opposed to the appellate Court reading mere cold points of the reasons of appeal. In cases where, as in our present appeal, there had been this undue and long delay in writing the judgment I am of the view that the learned Magistrate is in no better position than the appellate Court as the learned Magistrate himself could not possibly take advantage of the fact that he had seen and heard the witnesses. In this case I feel that I am in an equally good position to assess and weigh the facts adduced as the learned Magistrate himself at the lower Court.

It was urged upon me by the learned DPP that as this was one of the sensational cases that the learned Magistrate could have remembered what actually transpired at the trial even over two years before. I find myself unable to agree and accept this contention. As I see it there is nothing special or sensational about this common or garden case as to leave such a permanent impression in the mind of the learned Magistrate. Since hearing this case he must have heard hundreds of other cases.

In view of this I feel that it is necessary for me to examine all the evidence adduced in order to ascertain for myself whether the learned Magistrate was justified in finding the appellant guilty of the charge preferred against him.

The whole case against the appellant revolves around the testimony of the complainant, Rubiyah bte Ahmad (PW1). She started off her evidence by saying that she lodged the report against the appellant because he "attempted to rape me". I do not understand why she said this and why it was allowed to pass unchallenged as there is not one iota or even a hint of evidence either in her police report or the whole of her oral evidence to this effect, as her allegations were only in the nature of an outrage on her modesty. The learned Magistrate in his grounds of judgment appeared to have been impressed with her testimony and accepted the whole of her evidence since as he said her evidence was not only credible by itself but also corroborated by the testimony of two of her colleagues (PW3 and PW6). In view of this finding I am duty bound to go through the evidence of PW1 and to see if her evidence is indeed credible and corroborated.

In support of her allegation PW1 said that she started working with the appellant on 2 January 1981 as a Clerk. She said that three days later on 5 January 1981, she went to work as usual at 8.30 a.m. On that day she had on a long sleeved blouse and midi skirt. At about 8.40 a.m. when appellant arrived he called her and two colleagues one by one into his office. The other two ladies were in fact Norailah bte Othman (PW3) and Everlyn Chin Lan Siew (PW6). PW3 was called in first and after she came out PW1 was called in. In the room PW1 alleged that appellant asked her to turn round so that he could have a look as to whether her attire was sexy enough. PW1 said appellant requested her to put on sexy clothes with low necklines. PW1 alleged that appellant then asked her to raise her brassier strap so that her breasts would be prominent. He asked her to go and do this in the toilet. PW1 went to the toilet and did as requested and came back to the appellant's office whereupon appellant apparently was not satisfied and asked PW1 to go and adjust her brassier further. At first PW1 objected but appellant allegedly threatened to dismiss her. PW1 said that as she feared being dismissed she agreed to go to the toilet a second time to re-adjust her brassier. PW1 also said that if she failed to do so he would do it for her. PW1 said she cried and went to the toilet to do as asked. While in the toilet PW1 said she heard a knock on the door and thinking it was one of her colleagues she opened the door to find the appellant who entered the toilet. At this stage PW1 said appellant wanted to adjust her brassier himself. She objected to this and again appellant threatened her with dismissal. PW1 said that she allowed appellant to adjust her brassier. In doing this PW1 said appellant put his hand inside her brassier and fondled her breast. After that appellant left the toilet and she came out later crying. After that she went home and when her father returned home for lunch she narrated the incident to him and he took her to the police station where PW1 lodged a police report (P1). In P1 she narrated what transpired as mentioned above and added that was not the first time this happened. She said that about two days earlier almost a similar incident occurred but PW1 stopped him. How she stopped him she did not elaborate nor was she questioned on this.

This then is the total sum of her testimony which found favour with the learned Magistrate. In cases of this nature although corroboration of the evidence of the complainant is legally not essential but is certainly highly desirable. The reason for this must be obvious. An allegation of this nature is one which is very easy to make but very difficult to rebut. When such an allegation is then made it is necessary first and foremost to see the probability of it and then to see whether it is supported by independent evidence besides that of the complainant herself, or is corroborated by the conduct and the surrounding circumstances. Corroboration, strictly speaking, must necessarily mean independent corroboration of material facts which implicate the accused person and tends to confirm that he is guilty of the offence with which he is charged. The testimony of PW1 should be subjected to close scrutiny and received with the greatest caution unless corroborated.

Let us then look at the testimony of PW1 to see whether it is in itself credible as held by the learned Magistrate. I find it hard to believe or accept that when as she said, she opened the toilet door appellant entered the toilet saying he wanted to adjust her brassier himself. In the first place she allowed him to enter the toilet without any protest and knowing why he entered the toilet she still remained in the toilet. She did not scream and run out as any reasonable lady in the same circumstances would have done. If appellant had wanted to do what was alleged against him why is it that he did not do so when she went to the toilet the first time. No evidence that after he entered the toilet the door was closed or not. Would appellant do what was alleged with the door probably wide open, with his wife in the vicinity and lastly not knowing whether in spite of the alleged threat, she might scream not only when he did the act but the very moment he even entered the toilet. All these to my mind are improbable. The learned Magistrate also relied on her credibility on the fact that she was consistent and was never shaken in cross-examination. Being unshaken in cross-examination and being consistent alone are not the criteria to assess the credibility or otherwise of the testimony of a witness. The inherent probability or improbability of what the evidence given has also to be considered. PW1 should have been on extra guard the moment she saw appellant at the toilet as she alleged especially when as she said almost a similar incident occurred about two days earlier.

Let us now examine the testimonies of PW3 and PW6 who the learned Magistrate said corroborated PW1. On the day in question PW3 said she too was called in by the appellant and told to adjust her brassier which she did. Now what transpired in appellant's office between PW1 and the appellant, PW3 did not and could not see. All she saw was that PW1 too was called in and after that she saw PW1 going to the toilet and crying after a third time she came out of the toilet. So what then had she corroborated PW1? From my examination of the whole of her evidence I can only see that PW3 merely corroborated PW1 on the fact of PW1 entering the appellant's office and going to the toilet about three times and later crying. PW3 even added that PW1 cried because appellant had scolded her.

The testimony of PW6 is in a far worse position. The whole of her testimony is so scanty that it consisted of only five sentences. She merely said that on that morning she too was called and later she saw PW1 crying.

Can the testimony of these two witnesses be considered as independent corroboration of material facts tending to implicate appellant and tends to confirm that he had committed the crime with which he was charged? With respect to the learned Magistrate I feel that he was carried away by emotion rather than by evidence. This appears to be evident from some sharp and uncalled for remarks made by him against the appellant without any basis. Appellant

may be a freak in that he likes to see big or full bosomed women in tight and sexy clothes but that does not prove the allegation flung against him. I find that what the learned Magistrate held to be corroboration were not in fact corroboration at all. Both PW3 and PW6 said that when they saw PW1 crying she did not complain anything to either of them. I would have thought that these two colleagues would be the first persons to whom PW1 would have told what transpired in the toilet. PW1, PW3 and also PW6 all confirmed that morning appellant's wife was in the office somewhere. That being so would appellant take the risk of doing what PW1 alleged not knowing how PW1 would react? The learned Magistrate remarked that appellant was the sort of person who had the tendency to do what was alleged against him even when his wife was in the office. I do not know what prompted the learned Magistrate to pass this harsh remark without any basis.

Not only is the allegation of PW1 most improbable but as there is no corroboration of her testimony the learned Magistrate ought to have taken extra care to scrutinise, assess and test her evidence with the totality of all surrounding circumstances, and this he failed to do. He accepted her evidence wholesale and in the circumstances I find it unsafe for the learned Magistrate to do so. Even applying the principle in the Privy Council case of *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11 at the close of the prosecution's case the learned Magistrate ought to have held that no *prima facie* case had been made out if unrebutted would warrant a conviction and as such the defence should not have been called let alone appellant convicted. For these reasons I must reluctantly interfere in this case and allow the appeal. The conviction is quashed the fine imposed if paid is to be refunded.

Also found at [1985] 2 CLJ 86